



## **Brownfields Handbook: How to Manage Federal Environmental Liability Risks**



<http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/handbook/bfhbkcmp.pdf>



*Printed on Recycled Paper*

**Recycled/Recyclable** - Printed with vegetable oil-based inks on recycled paper (minimum 50% postconsumer)

---

## Statutory and Regulatory Provisions

### Protection of Government Entities That Acquire Property Involuntarily

CERCLA sections 101(20)(D) and 101(35)(A) protect federal, state, and local government entities from owner/operator liability if they involuntarily acquire contaminated property while performing their governmental duties. If a unit of state or local government makes an involuntary acquisition, it is exempt from owner/operator liability under CERCLA. Additionally, a state, local, or federal government entity that makes an involuntary acquisition will have a third-party defense to owner/operator liability under CERCLA if:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

Regulations set forth at 40 CFR 300.1105, and validated by the 1996 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, provide some examples of involuntary acquisitions.

As the following examples indicate, a government entity need not act completely passive in order to acquire property involuntarily. Often government entities must take some sort of discretionary, volitional action before they can acquire property following circumstances such as abandonment, bankruptcy, or tax delinquency. In these cases, the “involuntary” status of the acquisition is not jeopardized.

---

### **Acceptable Involuntary Acquisitions**

EPA considers an acquisition to be “involuntary” if the government’s interest in, and ultimate ownership of, the property exists only because the conduct of a non-governmental party gives rise to the government’s legal right to control or take title to the property.

Involuntary acquisitions by government entities include the following:

- Acquisitions made by a government entity functioning as a sovereign (such as acquisitions following abandonment or tax delinquency);
- Acquisitions made by a government entity acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisitions of the security interests or properties of failed private lending or depository institutions);
- Acquisitions made by a government entity through foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program; and
- Acquisitions made by a government entity pursuant to seizure or forfeiture authority.

### **Other Considerations**

A government entity will **not** have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Furthermore, the liability exemption and defense described above do not shield government entities from liability as generators or transporters of hazardous substances under CERCLA section 107(a)(3) or (4).

In June 1997, EPA issued a policy that further clarifies the CERCLA liability of government entities that involuntarily acquire property (*see page 59 and fact sheet on page 125*).

---

## EPA Policies and Guidances

### **Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities**

June 30, 1997

The lender liability policy clarifies the circumstances in which EPA intends to apply, as guidance, the provisions of the 1992 CERCLA Lender Liability Rule ("Rule") and its preamble in interpreting CERCLA's lender and involuntary acquisition provisions. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended these CERCLA provisions and generally followed the approach of the Rule. EPA's subsequent lender policy explains that when interpreting the amended secured creditor exemption, EPA will treat the Rule and its preamble as authoritative guidance. For example, the amendments do not clarify the steps that a lender may take after foreclosure and still remain exempt from owner/operator liability. In making liability determinations, EPA, following its policy, will defer to the Rule (*see box, page 60*).

The 1996 amendment also validates the portion of the Rule that addresses involuntary acquisitions by government entities. EPA's policy clarifies that similar to the preamble of any valid regulation, EPA will look to the preamble to the CERCLA Lender Liability Rule as authoritative guidance on the meaning of the portion of the Rule that addresses involuntary acquisitions.

---

***For further information contact:***

Bob Kenney - (202) 564-5127  
Office of Site Remediation Enforcement

## **The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities**

United States Environmental Protection Agency  
Office of Enforcement and Compliance Assurance  
December 1995

Units of state, local, and federal government sometimes involuntarily acquire contaminated property as a result of performing their governmental duties. Government entities often wonder whether these acquisitions will result in Superfund liability. This fact sheet summarizes EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. This fact sheet also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

### **Introduction**

EPA's Brownfields Economic Redevelopment Initiative is designed to help states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

Many municipalities and other government entities are eager for brownfields to be redeveloped but often hesitate to take any steps at these facilities because they fear that they will incur Superfund liability.

This fact sheet answers common questions about the effect of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund, and set forth at 42 United States Code

---

beginning at Section 9601) on involuntary acquisitions by government entities. EPA hopes that this fact sheet will facilitate government entities' plans for redevelopment of brownfields and the "brokerage" of those facilities to prospective purchasers.

### **What is an involuntary acquisition?**

EPA considers an acquisition to be "involuntary" if it meets the following test:

- The government's interest in, and ultimate ownership of, the property exists only because **the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.**

For example, a government's acquisition of property for which a citizen failed to pay taxes is an involuntary acquisition because the citizen's tax delinquency gives rise to the government's legal right to take title to the property.

### **Will a government entity**

### **that involuntarily acquires contaminated property be liable under CERCLA?**

To protect certain parties from liability, CERCLA contains both liability exemptions and affirmative defenses to liability. A party who is exempt from CERCLA liability with respect to a specified act cannot be held liable under CERCLA for committing that act. A party who believes that he or she has an affirmative defense to CERCLA liability must prove so by a preponderance of the evidence.

After it involuntarily acquires contaminated property, a unit of state or local government will generally be exempt from CERCLA liability as an owner or operator. In addition, the unit of state or local government will have a somewhat redundant affirmative defense to CERCLA liability known as a "third-party" defense, provided other requirements for the defense, which are described below, are met. A federal government entity that involuntarily acquires contaminated prop-

---

## Fact Sheet

erty and meets the requirements described below will have a third-party defense to CERCLA liability.

The requirements for a third-party defense to CERCLA liability are the following:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

A government entity will **not** have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination from the property. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Government entities should therefore ensure that

they do not cause or contribute to the actual or potential release of hazardous substances at facilities that they have acquired involuntarily.

For more information, see 42 U.S.C. 9601(20) (D), 9607(b)(3), and 9601(35)(A) and (D).

It is also important to note that the liability exemption and defense described above do not shield government entities from any potential liability that they may have as "generators" or "transporters" of hazardous substances under CERCLA. For additional information, see 42 U.S.C. 9607(a).

### **What are some examples of involuntary acquisitions?**

CERCLA provides a non-exhaustive list of examples of involuntary acquisitions by government entities. These examples include **acquisitions following abandonment, bankruptcy, tax delinquency, escheat** (the transfer of a deceased person's property to the government when there are no competent

---

heirs to the property), and other circumstances in which the government involuntarily obtains title by virtue of its function as a sovereign.

**What is EPA's official policy regarding CERCLA enforcement against government entities that involuntarily acquire contaminated property?**

In 1992, EPA issued its Rule on Lender Liability Under CERCLA ("Rule"), 57 *Federal Register* 18344 (April 29, 1992). The Rule included a discussion of involuntary acquisitions by government entities. In 1994, the Rule was invalidated by the court.

In September 1995, EPA and the U.S. Department of Justice (DOJ) issued their "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" ("Lender Policy"). In the document, EPA and DOJ reaffirm their intentions to follow the provisions of the

Rule as enforcement policy. The Lender Policy advises EPA and DOJ personnel to consult both the Rule and its preamble while exercising their enforcement discretion with respect to government entities that acquire property involuntarily. Most of the relevant portions of the Rule and preamble have been summarized in this fact sheet.

Under the Lender Policy, EPA has expanded the examples listed in CERCLA by describing the following categories of involuntary acquisitions:

- Acquisitions made by government entities **acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority** (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through **foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program**; and
- Acquisitions by government entities **pursuant to seizure or forfeiture authority**.

Similar to the examples listed in CERCLA, EPA's list of



categories of involuntary acquisitions is non-exhaustive. To determine whether an activity not listed in CERCLA or under the Lender Policy is an "involuntary acquisition," one should analyze whether the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

**If a government entity takes some sort of voluntary action before acquiring the property, can the acquisition still be considered "involuntary"?**

Yes. Involuntary acquisitions, including the examples listed in CERCLA, generally require some sort of discretionary, volitional action by the government. A government entity need not be completely "passive" in order for the acquisition to be considered "involuntary" for purposes of CERCLA. For further discussion, see 57 *Fed. Reg.* 18372 and 18381.

**Will a government entity**

**that involuntarily acquires contaminated property be liable under CERCLA to potentially responsible parties and other non-federal entities?**

If a unit of state or local government involuntarily acquires property through any of the means listed in CERCLA, it will be exempt from CERCLA liability as an owner or operator. In addition, any government entity will have a third-party defense to CERCLA liability if all relevant requirements for that defense are met (see above).

If a government entity acquires property through any other means, it appears likely-based on the way that courts have treated lender issues during the last few years - that a court would apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. Analysis of these acquisitions may require an examination of case law and state or local laws.

**If someone dies and leaves**

---

**contaminated property to a government entity, is this considered an involuntary acquisition?**

No, this type of property transfer is not considered an involuntary acquisition under CERCLA. However, CERCLA provides a third-party defense for parties that acquire property by inheritance or bequest (a gift given through a will). Thus, a government entity that acquires property in this manner will have a third-party defense to CERCLA liability if all relevant requirements of that defense are met and the government entity has not caused or contributed to the release or threatened release of contamination from the property (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601 (35)(A) and (D).

**Will a government entity that uses its power of eminent domain be liable under CERCLA?**

After a government entity acquires property through the exercise of eminent domain

(the government's power to take private property for public use) by purchase or condemnation, it will have a third-party defense to CERCLA liability if all requirements for that defense are met (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A).

**Will parties that purchase contaminated property from government entities also be exempt from CERCLA liability?**

No. Nothing in CERCLA allows non-governmental parties to be exempt from liability after they knowingly purchase contaminated property. However, EPA encourages prospective purchasers of contaminated property to contact their state environmental agencies to discuss these properties on a site-by-site basis. At sites where an EPA action has been taken, is ongoing, or is anticipated to be undertaken, various tools, including "prospective purchaser agreements," may be an option.

---

## Fact Sheet

---

***For further information:***

The Lender Policy was published in the Federal Register in Volume 60, Number 237, at pages 63517 to 63519 (December 11, 1995).

You may order copies of the Lender Policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161.

Orders must reference NTIS accession number PB95-234498. For telephone orders or further information on placing an order, call NTIS at 703-487-4650 for regular service or 800-553-NTIS for rush service. For orders via e-mail/Internet, send to the following address [orders@ntis.fedworld.gov](mailto:orders@ntis.fedworld.gov)

If you have questions about this fact sheet, contact Bob Kenney of EPA's Office of Site Remediation Enforcement at (202) 564-5127.